Case No. S213478

IN THE SUPREME COURT OF CALIFORNIA

CALIFORNIA BUILDING INDUSTRY ASSOCIATION
Plaintiff and Respondent,

v.

BAY AREA AIR QUALITY MANAGEMENT DISTRICT
Defendant and Appellant.

After a Decision by the Court Of Appeal
First Appellate District, Division One
Case Nos. A135335 & A136212

Appeal from the Alameda County Superior Court, Case No. RG10548693
The Honorable Frank Roesch, Judge Presiding

BAY AREA AIR QUALITY MANAGEMENT DISTRICT'S ANSWERING BRIEF

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INTRODUCTION

There is no such thing as "reverse CEQA." There are only the provisions of the California Environmental Quality Act, which require agencies to analyze the significant effects of a project on the environment. When a project will change the environment by attracting people to a location and exposing them to significant, adverse environmental conditions, the project will have a significant effect on the environment. This conclusion flows directly from CEQA's definition of "environment" and "significant effect on the environment," and from its direction that a project will have a significant effect on the environment where it causes "substantial adverse effects on human beings, either directly or indirectly." Public Resources Code section 21083(b)(3).[1] Accordingly, CEQA's plain language requires analysis of "existing environmental conditions" where they may have substantial adverse impacts on "future residents or users of a project."

For the past forty years, the California Resources Agency has issued regulatory guidance (the "CEQA Guidelines") requiring agencies to analyze whether a project will cause significant impacts by exposing humans to adverse environmental conditions. During this time, the Legislature was aware of the Resources Agency's interpretation of CEQA

[1] All subsequent references are to the Public Resources Code unless otherwise noted.

and did not modify the law to change CEQA's application. On the contrary, it adopted several CEQA amendments that guide how agencies must conduct this type of analysis in certain circumstances. *E.g.*, §§ 21151.8, 21096. The plain language and legislative history of these sections demonstrates that the Legislature believed that CEQA already required agencies to conduct this analysis and simply provided additional parameters for analyzing certain types of impacts. Agencies across the state have in fact analyzed impacts from exposing people to adverse environmental conditions, and numerous court decisions are also premised on the understanding that CEQA requires this analysis.

Yet in 1995, in a decision that addressed neither Public Resources Code section 21083(b)(3) nor the CEQA Guidelines, the court of appeal found that CEQA does not require agencies to analyze the impacts of exposing people to adverse environmental conditions. *Baird v. County of Contra Costa* (1995) 32 Cal.App.4th 1464. This decision lay dormant for almost 15 years. However, in the past five years, its holding—that CEQA is concerned with the impacts of a project on the environment, and not the environment on the project—has been applied by three other appellate court decisions. *City of Long Beach v. Los Angeles Unified School District* (2009) 176 Cal.App.4th 889, 895, 900, 905; *South Orange County Wastewater Authority v. City of Dana Point* (2011) 196 Cal.App.4th 1604,

1608-09 ("*SOCWA*"); *Ballona Wetlands Land Trust v. City of Los Angeles* (2011) 201 Cal.App.4th 455, 472-74.[2]

The *Baird* cases intoned that CEQA is not concerned with "impacts on the project caused by the environment" and that "reverse CEQA" is not required. *See* CBIA's Opening Brief ("CBIA Br."), pp. 26-27. But such phrases, whatever their rhetorical appeal, cannot substitute for a reasoned analysis of CEQA's plain language, implementing guidelines, and legislative history. None of the *Baird* cases undertook an in-depth analysis of CEQA's legislative and regulatory history. If they had done so, they could not have reached the conclusions that they did.

This case implicates the question presented because in 2010 the Bay Area Air Quality Management District ("Air District") adopted thresholds of significance ("Thresholds") designed to assist agencies in evaluating the significant air quality impacts of projects. Among these Thresholds are the "TAC Receptor Thresholds," which address impacts associated with locating new development in close proximity to sources of toxic air contaminants (or "TACs"). The District first issued thresholds to address health risks from exposing people to TACs in 1999 in response to unrefuted evidence that people who live near sources of TACs, such as freeways, ports, or truck distribution centers, are at a higher risk for cancer and

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[2] This brief will refer to these cases collectively as "the *Baird* cases."

respiratory ailments. Although the 1999 thresholds went unchallenged and were applied for many years, when the District adopted its 2010 TAC Receptor Thresholds, the California Building Industry Association ("CBIA") challenged them as invalid under the *Baird* cases.

As detailed in this brief, the TAC Receptor Thresholds are consistent with CEQA's requirement to evaluate the impact of locating new development in areas subject to adverse environmental conditions. In fact, it makes no sense to require agencies to analyze the health impacts of siting a new freeway near residents and yet ignore the exact same impacts when siting new development near a freeway. Nor would interpreting CEQA in this manner conform with the law's purpose to provide decision makers and the public with complete information about a project's impacts.

Nevertheless, even if the Court agrees with the *Baird* cases, it should not set aside the TAC Receptor Thresholds. CBIA only challenged the Thresholds on their face. Accordingly, CBIA bears the burden of demonstrating that the TAC Receptor Thresholds are invalid in all of their applications. As the Court of Appeal found, there are numerous instances where agencies could use the TAC Receptor Thresholds to evaluate the significant health risks of their development decisions even if the *Baird* cases correctly interpreted CEQA. Therefore, CBIA's facial challenge must fail.

A decision that upholds the TAC Receptor Thresholds, regardless of the Court's ruling on the broader issue presented, is particularly appropriate here. The Thresholds are not binding on any public agency and do not mandate any particular analysis under CEQA. Because they are simply nonbinding tools to assist agencies during the environmental review process, they do not, and cannot, violate CEQA, and must be upheld.

STATEMENT OF THE CASE

I. Statement of Facts.

A. The Air District's Structure and Authority.

The Air District is a regional agency charged with protecting air quality in the nine-county San Francisco Bay Area. Governed by a 22-person Board of Directors consisting of county supervisors, mayors, and city council members, the Air District has primary responsibility for controlling air pollution from stationary sources in the Bay Area. Health & Safety Code §§ 40000, 40200, 40220.5, 40221, 40221.5. Among other activities, the Air District issues permits to certain emitters of air pollution and promulgates rules to control emissions. *See, e.g., id.* §§ 42300, 42301.5, 42315.

The Air District, like all public agencies, also acts pursuant to CEQA. Occasionally the Air District acts as a "lead agency" when conducting environmental review for permits that it issues or when it acts in its regulatory capacity to adopt rules or air quality plans. Administrative

Record Vol. 9, p. 2056 (hereafter "AR vol:p"). More frequently, it only comments on the air quality impacts of projects being analyzed by other agencies. AR 9:2056, 2058; *see also* Cal. Code Regs., tit. 14, (CEQA "Guidelines") § 15044. The Air District does not act as a lead agency for the residential and commercial development projects developed by CBIA's members. AR 9:2056, 2058; 27:6132 (Air District is not a lead agency for development projects); Clerk's Transcript Vol. 4, p. 1085 ("CT vol:p") (CBIA represents "member companies involved in residential and light commercial construction").

B. The Air District Updates Its Thresholds.

Under CEQA, lead agencies must analyze, disclose, and mitigate the significant environmental impacts of projects they approve. §§ 21002, 21065. In order to determine whether particular impacts are "significant," agencies utilize "thresholds of significance" – identifiable standards for environmental impacts "compliance with which means the effect normally will be determined to be less than significant." Guidelines § 15064.7(a). Agencies may either rely on generally applicable thresholds that it or other agencies have developed or may develop thresholds on a project by project basis. *Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884, 896.

Because the Air District has expertise in air quality and related health issues, its staff previously published recommended thresholds of

significance in 1999 to assist lead agencies in conducting air quality analyses under CEQA. AR 23:5192-264. Since then, state and federal authorities have tightened air quality standards for some pollutants and developed new standards for others. AR 1:23.

In response to these developments and to "local governments' expressed need for additional CEQA guidance," the Air District undertook a multi-year process to review and update its 1999 thresholds. AR 1:1-3, 15, 24, 94; 27:6044. This process involved extensive public outreach, including at least twenty workshops for staff and the public, five public meetings of its full Board of Directors, and meetings with representatives from dozens of cities, counties, and non-governmental organizations. AR 1:1-3; 3:558-61; 1:187-88.

By Resolution 2010-06, the Air District Board unanimously adopted the agency's new Thresholds on June 2, 2010. AR 1:1-4; 5:1158-59. The Thresholds, like all thresholds of significance, are not binding on other agencies, but simply provide a measure by which agencies can assess the environmental impacts of a project. Guidelines § 15064.7(a). They are, in effect, a tool to expedite environmental review by "promot[ing] consistency, efficiency, and predictability" in the CEQA process. *Committee for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 110-11 ("*CBE*") (citation omitted). Lead agencies retain their duty and discretion to independently determine the significance

of impacts under CEQA. AR 28:6232 (Air District states that "The thresholds are recommendations to Lead Agencies . . . [and] [i]t is [up to] the Lead Agency's discretion to use the recommended thresholds."); Guidelines § 15064.7(c) (lead agencies must support their decision to use other agencies' thresholds with substantial evidence).

C. The Air District's Toxic Air Contaminant Thresholds.

The TAC Receptor Thresholds address health impacts from toxic air contaminants, a generic term for a variety of airborne pollutants that can cause serious human health hazards. AR 9:2096; 1:6 (showing TAC Receptor Thresholds, also called "Risks and Hazards" thresholds). TACs are emitted by a variety of sources, including vehicles and industrial plants, and their effects are generally local in nature. AR 9:2096. Studies show that TACs "can cause long-term health effects such as cancer, birth defects, neurological damage [and] asthma . . . or short-term acute affects such as eye watering, respiratory irritation . . . and headaches." *Id.* at AR 9:2096; 1:52 (citing studies), 59-60 (same). Some locations in the Bay Area have high existing levels of TACs due to emissions from freeways and industry. AR 5:1037; 8:1886-89; 28:6232.

The Air District's 1999 thresholds recognized that a project would normally have a significant impact if it would bring new residents to an area where an existing source of TACs would expose project residents to an excess cancer risk of 10 in one million. AR 23:5213. The Air District did

not change this standard in its new Thresholds. AR 1:6. However, it added new standards for cumulative TAC risks and for risks from particulates. AR 1:6-7. It also added a standard for plan-level projects (*e.g.*, general plans), which recognizes that a plan would not normally have a significant effect if the plan includes 500-foot overlay zones around TAC sources as well as policies to mitigate TAC impacts to new sensitive receptors located within those zones. AR 1:7; 9:2068, 2142.

This Court's grant of review is relevant only to the TAC Receptor Thresholds.[3] During the administrative process, some commenters questioned whether these Thresholds were consistent with CEQA because they addressed the impact of existing environmental hazards. AR 27: 6098, 6089. The Air District responded that "[a] Lead Agency can address a preexisting environmental condition - such as existing sources of toxics - under CEQA if there is a nexus between the preexisting condition and some physical change arising from the project." AR 27:6087. The mere existence of a preexisting environmental condition does not trigger CEQA review if a project does not expose anyone to that contamination; however,

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[3] Although CBIA's opening brief asserts that the Air District's odor thresholds are also invalid under *Baird*, nobody raised this issue during the administrative process, nor did CBIA raise it during the proceedings below. The issue is thus waived. § 21177; *Guardians of Turlock's Integrity v. Turlock City Council* (1983) 149 Cal.App.3d 584, 589, 600. In any event, CBIA's challenge to this Threshold fails for the same reasons its challenge to the TAC Receptor Threshold fails.

"where a change caused by the project will implicate the preexisting contamination in some way, such as introducing people to an area with a preexisting hazard, the contamination does warrant consideration under CEQA." *Id.* It also noted that "[t]his approach to evaluating risks to new occupants of a project from existing sources of risk has been endorsed by the Resources Agency in Section 15126.2(a) of the State CEQA Guidelines." *Id.*; AR 27:6096 (same).

Other commenters opined that the Air District should focus on preventing pollution at its source rather than having agencies analyze impacts of existing pollution on new receptors. AR 3:610; 27:6093. The Air District agreed that source reduction is important and described many other measures it is taking to address TAC pollution, including changing its rules for permitting new sources of air pollutants, imposing new rules on metal melting operations, and carrying out its Clean Air Plan. AR 5:1129. However, it noted that the Thresholds "represent an important step[] amongst many" for helping reduce exposure to toxic air pollution. AR 5:1130.

Finally, some commenters expressed concern that the TAC Receptor Thresholds would discourage infill development. AR 1:258-62; 27:6050, 6066-67. In response, the Air District refuted erroneous assertions that the Thresholds would ban all development near freeways (AR 5:1036, 1156) or render existing CEQA exemptions for infill projects unusable (AR 27:6064,

6069). It also conducted case studies of actual, proposed infill developments, which demonstrated that application of the TAC Receptor Thresholds would not require agencies to conduct full environmental impact reports ("EIR") for all infill projects. AR 5:1039-41; 27:6091, 6094, 6096-97; 29:6593-660.

District Board members also emphasized that they support infill development, but that agencies should not ignore that "one of the unintended consequences of smart growth . . . is putting people in a location where they're exposed to pollution." AR 5:1131. The Thresholds' role is simply to provide information to lead agencies so that they can determine whether the benefits of particular development outweigh its health risks. AR 5:1194, 7:1593. As one Board member noted, an EIR costs money, but exposing people to cancer risks from TACs also costs money: "the real world includes people that have to pay for oncologists, and if it ain't their insurance plan, it's the counties' insurance plans. One oncologist, one radiologist and a whole host of support staff, including the facility cost for one cancer case trumps any cost of an EIR." AR 5:1132. He concluded, "CEQA should be just as good . . . [at] protecting people as well as moths and Manzanita bushes." AR 5:1133.

II. Procedural History.

CBIA filed this action on November 29, 2010. On the merits, the trial court ruled that the Air District's adoption of the Thresholds was a

CEQA "project" because there was a "fair argument the implementation of the Thresholds will cause a reasonably foreseeable indirect effect in the environment" by discouraging infill development. CT 8:2243-44. The trial court declined to reach CBIA's claims that the TAC Receptor Thresholds are contrary to CEQA's purpose and that various Thresholds are not supported by substantial evidence. CT 8:2246.

The Court of Appeal reversed, finding that the Air District's adoption of the Thresholds was not a project subject to CEQA review because (1) CEQA provides specific procedures for adopting thresholds of significance, and CEQA review is not among those procedures (Opinion at 11-14), and (2) there was no substantial evidence supporting a fair argument that the Thresholds would cause developers to abandon infill development and build in the suburbs instead (Opinion at 16-18). In response to claims that the TAC Receptor Thresholds would discourage infill development, the court found, "the District's Thresholds did not purport to limit housing density in any way, and . . . the likelihood and extent of any displaced development was speculative at best." Opinion at 18.

The court also addressed CBIA's claim that the TAC Receptor Thresholds were contrary to CEQA's purpose. It first stated that CEQA "defines a 'significant effect on the environment' to include situations in which '[t]he environmental effects of a project will cause substantial

adverse effects on human beings, either directly or indirectly.' (Pub. Res. Code, § 21083, subd. (c)." Opinion at 24-25. It noted that "[a] new project located in an area that will expose its occupants to preexisting dangerous pollutants can be said to have substantial adverse effect on human beings." Opinion at 25. Ultimately, though, the court did not decide "whether, as a general rule, an EIR may be required solely because the existing environment may adversely affect future occupants of a project." *Id.* Rather, the court rejected CBIA's facial challenge because the Thresholds could be applied in various circumstances even under CBIA's interpretation of CEQA, and therefore did not present a total and fatal conflict with CEQA. *Id.*

CBIA petitioned this Court for review on three issues, and the Court granted review only on the issue of "[u]nder what circumstances, if any, does the California Environmental Quality Act . . . require an analysis of how existing environmental conditions will impact future residents or users (receptors) of a proposed project?"

STANDARD OF REVIEW

Resolution of the question presented rests on interpretation of CEQA's statutory requirements. The Court's goal in interpreting CEQA is to "determine the Legislature's intent . . . 'so that we may adopt the construction that best effectuates the purpose of the law.'" *Committee for Green Foothills v. Santa Clara County Board of Supervisors* (2010) 48

Cal.4th 32, 45 (citation omitted). The Court first looks at CEQA's statutory language "because it is generally the most reliable indication of legislative intent." *Id.* (citation omitted). If the statutory language is reasonably subject to multiple interpretations, the Court "may consult extrinsic aids to determine the Legislature's intent." *Id.* at 48. Such extrinsic aids include relevant legislative history as well as the regulatory guidelines implementing CEQA. *Id.*

The Court is also guided by the requirement that CEQA "'be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.'" *Laurel Heights Improvement Association v. Regents of Univ. of California* (1988) 47 Cal.3d 376, 390 (citing *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259 (disapproved on other grounds). *See also Friends of Mammoth,* 8 Cal.3d at 259 (this Court's task is to determine whether CEQA's language is "'sufficiently flexible' so as to effectuate the broad legislative intent.")

ARGUMENT

I. The Legislature Intended for CEQA to Protect New Users and Residents of Projects from Existing and Reasonably Foreseeable Adverse Environmental Conditions.

CEQA's plain language, its longstanding interpretation by the agency charged with interpreting the law, and its legislative history unequivocally demonstrate that the Legislature intended for CEQA to

apply to environmental impacts caused by exposing project residents or users to significant, adverse environmental conditions. Agencies have long complied with this requirement, and numerous courts have adjudicated claims that agencies failed to adequately conduct this analysis without questioning whether such analysis was required in the first place. CBIA's position that this analysis is contrary to CEQA fails to address the wealth of evidence of legislative intent and should be rejected.

A. CEQA's Plain Language Demonstrates that Exposing Human Beings to "Substantial Adverse Effects," Either Directly or Indirectly, Causes a "Significant Effect on the Environment."

CEQA applies to agency action that may cause a direct or reasonably foreseeable indirect change in the environment. § 21065; *Muzzy Ranch v. Solano County Airport Land Use Commission* (2007) 41 Cal.4th 372, 381-382. If that change constitutes a "significant effect on the environment," CEQA requires agencies to disclose, analyze, and mitigate the impact. §§ 21002, 21082.2(a). Thus, resolution of the issue presented by this case revolves around the definition of "environment" and "significant effect on the environment."

CEQA defines "environment" as the "physical conditions which exist within the area which will be affected by a proposed project, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance." § 21060.5. "A significant effect on the environment" is "a

substantial, or potentially substantial, adverse change" in those physical conditions. § 21068. CEQA further mandates a finding that a project may have a "significant effect on the environment" if "[t]he environmental effects of a project will cause *substantial adverse effects on human beings, either directly or indirectly*." § 21083(b)(3) (emphasis added).

Applying this plain language to the question presented demonstrates that CEQA requires analysis of the impacts a project will have by exposing people to environmental conditions that may substantially and adversely affect them.[4] First, new development causes a change in the existing physical conditions on the ground —an "environmental effect"—both by constructing homes (or daycare centers, apartment buildings, etc.) on the site and by bringing people to that area. Where the area is subject to adverse environmental conditions, the environmental effect of the project is potentially significant if the conditions will have "substantial adverse effects on humans," either "directly or indirectly." § 21083(b)(3). For example, a new residential development in an area subject to seismic hazards causes a change in the environment by bringing people to the project site. Where exposing people to these seismic hazards could result

[4] CEQA applies to both direct and reasonably foreseeable indirect impacts. § 21065; *Wal-Mart Stores, Inc. v. City of Turlock* (2006) 138 Cal.App.4th 273, 298, disapproved on other grounds. Although the question presented refers only to "existing" environmental conditions, CEQA encompasses both existing and reasonably foreseeable adverse environmental conditions.

in a substantial adverse effect on them, the project has a potentially significant impact that must be addressed under CEQA.

CBIA acknowledges that this case can be resolved based on CEQA's plain language. CBIA Br., pp. 15-16. However, rather than address this language in any depth, CBIA simply reiterates its position that CEQA is concerned only with the impacts of a project on the environment. *See* CBIA Br., pp.18-20. CBIA does not address how a project can have an "effect on the environment" by bringing people to an area, and it ignores section 21083(b)(3) completely. CBIA's oversight is fatal to its argument. Under section 21083(b)(3), the project's potentially significant effect on the environment is the exposure of people to the adverse environmental conditions.

"It is, of course, too late" for CBIA's "grudging, miserly" attempt to read out of CEQA one of the key statutory provisions at issue in this case. *See Bozung v. Local Agency Formation Commission* (1975) 13 Cal.3d 263, 274. Indeed, construing CEQA to address impacts resulting from exposing people to adverse environmental conditions is the only construction consistent with this Court's directive that CEQA be interpreted broadly to "protect[] not only the environment but also informed self-government." *Sierra Club v. State Board of Forestry* (1994) 7 Cal.4th 1215, 1229 (citation omitted). It is also the only one consistent with the courts' instruction that CEQA "protect[s] a variety of human values. Human

health is among them." *San Lorenzo Valley Community Advocates v. San Lorenzo Valley Unified School District* (2006) 139 Cal.App.4th 1356, 1372.

The law will not provide full disclosure or protect human health if agencies may ignore the substantial adverse risks posed by a project's location. No one disputes that agencies are required to disclose, analyze, and mitigate the substantial, adverse health impacts of siting a significant source of toxic air pollution—such as a new freeway or oil refinery—near people. Yet, CBIA's interpretation of CEQA would require agencies to ignore the exact same health risks when deciding where to site new residential development. This irrational result is inconsistent with the plain language of CEQA and its fundamental purposes, and this Court should reject it. *Western Oil & Gas Association v. Monterey Bay Unified Air Pollution Control District* (1989) 49 Cal.3d 408, 425 (courts should interpret statutory provisions to avoid illogical results); *Committee for Green Foothills,* 48 Cal.4th at 45 (courts should "adopt the construction [of CEQA] that best effectuates the purpose of the law") (citation omitted).

B. For the Past Forty Years, the California Resources Agency Has Interpreted CEQA to Require Analysis of the Impacts of Locating Development in Areas Subject to Adverse Environmental Conditions.

The California Resources Agency, through the Office of Planning and Research, is charged with adopting guidelines to implement CEQA and to provide "objectives and criteria for the orderly evaluation of projects."

§ 21083(a). The CEQA Guidelines are entitled to great weight, unless clearly unauthorized or erroneous. *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 448, fn. 4. Because the "Office of Planning and Research [] has special expertise in interpreting the CEQA statutes," this Court regularly consults the Guidelines when interpreting CEQA's statutory language. *Committee for Green Foothills,* 48 Cal.4th at 48-49; *see also Laurel Heights,* 47 Cal.3d at 394-95. Although the legislative history of sections 21068 and 21083 does not address the issue before the Court, as discussed below, the Legislature has long been aware of the Resources Agency's consistent interpretation of CEQA's statutory requirements.

1. The CEQA Guidelines Require Analysis of the Impacts of Exposing People to Adverse Environmental Conditions.

Almost since they were first adopted, the CEQA Guidelines have provided that a project "may have a significant effect on the environment" if it "[c]ould expose people or structures to major geologic hazards." *Bozung,* 13 Cal.3d at 279, fn. 21 (quoting former CEQA Guidelines §15081). Subsequent amendments to the Guidelines expanded the range of potentially significant adverse environmental conditions that agencies should address. By 1979, Guidelines section 15081 did not list potentially significant impacts (such as seismic hazards), but referred to the list of "consequences which may be deemed to be a significant effect on the

environment [ ] contained in Appendix G." Air District Motion for Judicial Notice ("MJN"), Exh. A. This appendix and Appendix I, in turn, stated that a project may have a significant effect on the environment if it exposes people to geologic hazards, flood risk, existing high levels of air pollution or noise, or other existing hazards. MJN, Exh. B (see Appendix G §§ (r), (x); Appendix I §§ (II)(1)(g), (II)(3)(i), (II)(6)(b), (II)(17)(b)).

In 1982, the Resources Agency created section 15126, which combined its prior guidance from section 15081 and the Appendices. This section stated that agencies must analyze "any significant environmental effects the project might cause by bringing development and people into the area . . . [because t]he subdivision would have the effect of attracting people to the location and exposing them to the hazards there." MJN, Exh. C, p. 77 (former CEQA Guidelines § 15126(a) [adopted 1982]).

When the Resources Agency substantially revised the Guidelines in 1998, it renumbered, but did not change, the language of section 15126 and replaced Appendix G with a modified version of former Appendix I. Remy et al., Guide to CEQA (11th ed. 2007) p. 219. The new Appendix G, like earlier versions of Appendix I, provided that agencies should address a range of adverse environmental conditions, including impacts from flooding, liquefaction, landslides, wildfire, and any other situation resulting in "[e]xposure of people to existing sources of potential health hazards." MJN, Exh. D, pp. 171-176 (§§ III(a)-(i), IV(b), V(b), IX(d), X(b)) (1997

version of Appendix I); MJN, Exh. E (§§ III(d), VI(a)-(d), VII(d)-(f), (h), VIII(g)-(j), XI(a)-(b), (e)-(f)) (1998 version of Appendix G).[5]

In 2009, the Resources Agency added a sentence to section 15126.2 that incorporated the agency's prior guidance from Appendix G. The new sentence, which remains today, states: "Similarly, the EIR should evaluate any potentially significant impacts of locating development in other areas susceptible to hazardous conditions (e.g., floodplains, coastlines, wildfire risk areas) as identified in authoritative hazard maps, risk assessments or in land use plans addressing such hazards areas." Guidelines § 15126.2(a).

2. The Resources Agency Provided a Reasoned Explanation for Its Guidelines.

In addition to consistently interpreting CEQA's requirements for the past forty years, the Resources Agency also explicitly responded to the argument that CEQA does not address the impacts of locating new development in areas with adverse environmental conditions. When it amended the Guidelines in 1982, the Resources Agency explained its requirement that an EIR "analyze effects on future development built as

[5] The Appendix G provisions contained in Exhibit E remain the same today, except that sections VII, VII and XI have been renumbered as sections VIII, XI, and XII. Courts have long relied on the Appendix G Checklist in determining whether a project may have a significant impact on the environment. *Protect The Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1110-11; *Berkeley Keep Jets Over the Bay Committee v. Board of Port Commissioners* (2001) 91 Cal.App.4th 1344, 1380.

part of the project and the effects on people who would occupy the project" as follows:

> This language responds to the ongoing debate over whether the EIR should be limited to examining effects on the pre-existing environment. . . . As shown in Public Resources Code Section 21083(c), the Legislature had a concern about adverse effects which projects may have on human beings. Accordingly, the guidelines declare that if a project would have the effect of attracting people to a location where the people would be exposed to environmental hazards, or disagreeable conditions, that attraction and the resulting exposure must be seen as a significant effect of the project.

MJN, Exh. C, p. 80. The Resources Agency went on to explain why its position is consistent with CEQA's statutory language:

> Public Resources Code Section 21083(c) . . . was enacted by the same bill that defined the term "environment" as meaning the physical conditions existing in the area affected (AB 889 of 1972, Ch. 1154 of the Statutes of 1972). Accordingly, we believe they must be construed together rather than independently. One must not be seen as taking precedence over the other because they are both part of the same legislative enactment.

RJN, Exh. F.

Addressing the situation where a residential project would be affected by noise from an existing airport, the Resources Agency found "that building residential dwellings in an area exposed to high levels of noise from aircraft would involve a change in the environment." *Id.* This change "would attract people to the area as buyers or renters of the residential units. As a result, the project would cause the exposure of people to the unusually high noise levels generated by the aircraft."

Id. Because this noise would be "an adverse effect on human beings resulting indirectly from the construction of the residential units in that particular location. . . we believe there would be a significant effect on the environment, and an EIR should have been prepared." *Id.*[6]

As this discussion demonstrates, CBIA is simply wrong that the Resources Agency first interpreted CEQA to require analysis of adverse environmental conditions on project residents in 1998. CBIA Br., pp. 3, 28. Rather, multiple versions of the Guidelines, reflecting the consistent opinion of multiple administrations over forty years, have required this type of analysis. Such a long-standing interpretation of a statute by the agency primarily responsible for its implementation "is entitled to great weight," and "[t]his deference is especially appropriate where the agency's interpretation is congruent with the statute's language and obvious purpose." *Western Oil & Gas,* 49 Cal.3d at 425.

Indeed, the Legislature was well aware of the Resources Agency's interpretation of the statute. Specifically, in 1983, the Chairman of the Assembly Committee on Natural Resources asked the State Bar Committee on the Environment to study how CEQA was working and recommend ways to clarify the Act. MJN, Exh. G, pp. 1-2. The Bar Committee held

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[6] The Legislature apparently agreed with the Resource Agency's interpretation, as it later enacted section 21096, which requires agencies to utilize a particular technical resource when analyzing noise and safety impacts of projects located near airports.

hearings and drafted a report entitled "The California Environmental Quality Act: Recommendations for Legislative and Administrative Change," which ultimately formed the basis for modifications to CEQA. *Id.*; MJN, Exh. H.

Among other issues, the State Bar Committee analyzed a concern that "CEQA should not be used to discuss 'reverse impacts' (i.e., effects felt when the project is proposed where impacts already exist, such as housing located next to an existing freeway or dumpsite)." MJN, Exh. H, p. 45. In response to this concern, the report stated that

> *It is clear under existing law that the impacts associated with locating adjacent to an area which produces adverse environmental effects must be discussed* (Guidelines § 15126). The law provides that where a project will result in public health problems, the project causes environmental effects by bringing people into an area that exposes them to public health problems. (*Id*).

Id. (emphasis added). Although the Report recommended a number of changes to CEQA, many of which the Legislature adopted, it did not recommend changing CEQA to address or override Guidelines section 15126, nor did the Legislature choose to do so. *Id.*; MJN, Exh. I (showing final language of chaptered bill).

C. Courts Have Repeatedly Acknowledged that CEQA Requires Agencies to Analyze the Impacts of Exposing People to Adverse Environmental Conditions.

Not only has the Resources Agency consistently interpreted CEQA to require the analysis of exposing people to adverse environmental

conditions, numerous appellate decisions are premised on this requirement. In 1974, the court in *People v. County of Kern* (1974) 39 Cal.App.3d 830, 836, 842, set aside the rezoning for a new subdivision because the EIR improperly failed to respond to comments that the development was directly over the San Andreas fault and adjacent to other faults. Since agencies only need to respond to comments on *environmental* impacts (§ 21091(d)(2); *Citizens for East Shore Parks v. State Lands Commission* (2011) 202 Cal.App.4th 549, 568), this ruling depended on the court's determination that locating the project in an area of seismic instability would cause impacts "on the environment."

Most recently, in *City of Maywood v. Los Angeles Unified School District* (2012) 208 Cal.App.4th 362, 390-92, the court set aside the approval of a new school site because the school district had not adequately addressed whether students would face significant traffic hazards from an existing, heavily trafficked road that would bisect the campus. The court could not have reached this conclusion if CEQA did not require agencies to analyze the impacts that adverse environmental conditions will have on future users of a project. *See also Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 269-70 (acknowledging trial court holding that EIR did not sufficiently analyze impacts to future residents from wildfire hazard).

Numerous other cases, finding agencies had adequately analyzed impacts that adverse environmental conditions will have on a project, demonstrate that, for years, agencies have been conducting this analysis when appropriate. *People v. County of Kern* (1976) 62 Cal.App.3d 761, 770-71 (acknowledging County resolution discussing earthquake and fire hazards); *Oakland Heritage Alliance*, 195 Cal.App.4th at 896-97 (acknowledging that the "project would have a significant seismic effect if it would expose people or structures to 'substantial risk of loss, injury, or death,'" but finding that the EIR adequately analyzed and mitigated this impact); *California Oaks Foundation v. Regents of the University of California* (2010) 188 Cal.App.4th 227, 263-64 (applying Guidelines section 15126.2 to analysis of the impacts of geologic hazards on a project); *Citizen Action to Serve All Students v. Thornley* (1990) 222 Cal.App.3d 748, 757 (impact of earthquakes on student safety is a cognizable CEQA impact, though not a significant impact here); *Cadiz Land Company, Inc. v. Rail Cycle, L.P.* (2000) 83 Cal.App.4th 74, 103-04 (upholding analysis of seismic conditions in area where landfill was to be located); *Porterville Citizens for Responsible Hillside Development v. City of Porterville* (2007) 157 Cal.App.4th 885, 906-09 (acknowledging requirement to address impacts to a housing project that would be exposed to impacts from "grading/drainage/erosion," but finding no evidence to require preparation of an EIR.)

CBIA notes that these cases assumed, rather than decided, that CEQA requires an analysis of the impacts associated with exposing project residents or users to adverse environmental conditions. CBIA Br., pp. 33-34. However, that fact reflects the widely held understanding that these impacts fall within CEQA's ambit. These cases would not have been decided as they were if CEQA did not require an analysis of these impacts. *See Taxpayers for Accountable School Bond Spending v. San Diego Unified School District* (2013) 215 Cal.App.4th 1013, 1052, fn. 26 (rejecting claim that parking impacts fall outside CEQA's scope: the fact that agencies have long analyzed parking impacts and courts have adjudicated claims that agencies improperly analyzed such impacts "reflect[s] a presumption that the lack of sufficient parking can constitute a significant impact on the environment").

D. CEQA's Requirement to Analyze Impacts of Adverse Environmental Conditions on Project Users Is A General Rule, Not An Exception.

CBIA acknowledges that CEQA explicitly requires agencies to analyze the impacts of exposing people to existing, adverse air, noise, and safety conditions. CBIA Br., pp. 34-39. However, it claims that these are specific statutory exceptions, rather than evidence of CEQA's general purpose to protect people from adverse environmental conditions. *Id.* Neither the plain language of these sections nor their legislative history supports CBIA's position. On the contrary, their language and history

demonstrate that the provisions carry out CEQA's mandate to analyze significant impacts that a project will have *on the environment*, and that the Legislature simply intended to provide additional requirements for this analysis in particular circumstances. Other statutory provisions also demonstrate this intent.

1. Noise and Safety Impacts From Existing Airports.

Public Resources Code section 21096 addresses safety and noise impacts of locating new development near an existing airport by requiring the use of "the Airport Land Use Planning Handbook . . . to *assist in the preparation* of the environmental impact report" for that new development. § 21096 (emphasis added). The section does not begin by stating that agencies must analyze the impacts of locating development near airports; rather, it *assumes* that agencies will already be doing this analysis, and simply specifies the manner in which they must conduct their analysis. § 21096 (a) ("[i]f a lead agency prepares an environmental impact report," it shall utilize particular "technical resources").

The import of this section is apparent when compared to CEQA's general requirements, which typically do not specify the methodology by which agencies must analyze particular impacts. Instead, as a general rule, CEQA grants lead agencies the discretion to determine the method by which they will evaluate significant project impacts. 1 Kostka & Zischke, Practice Under the California Environmental Quality Act (Cont.Ed.Bar

2012) §13.60, p. 680 ("Kostka & Zischke") (in measuring air quality impacts, agencies may use any "methodologies . . . [that] are supported by substantial evidence"); *Eureka Citizens for Responsible Government v. City of Eureka* (2007) 147 Cal.App.4th 357, 372 (agencies may choose methodologies for measuring impacts and courts will not second guess those choices). In the case of noise impacts from airports, however, the Legislature determined that agencies should use a specific methodology.

The legislative history of SB 1453 (1994), which created section 21096, bears out this interpretation. For example, an enrolled bill report demonstrates that the Legislature did not believe the bill imposed a new requirement to analyze impacts from existing environmental conditions; rather, the Legislature merely wished to guide agencies in carrying out their preexisting duties:

> Although *the sponsor recognizes that CEQA currently requires local agencies to consider any significant effects on the environment and that the agencies should already consider the effect of airports on a proposed project*, there have been three lawsuits in the past decade (in Jackson, Ceres, and Clear Lake) where the court determined that a local agency failed to adequately consider an airport's effects. The sponsor argues that in each case a planner did not have significant experience in land use planning near airports, and had no knowledge that the Airport Land Use Planning Handbook existed or should be used in preparing the EIR

MJN, Exh. J, p. 2 (emphasis added); s*ee also* MJN, Exh. K, p. 2 ("[t]he provision dealing with safety hazards and noise analysis restates requirements already substantially addressed in the CEQA statute and

guidelines," including Appendix I); MJN, Exh. L (the bill would impose "no added costs" because it only provides "standardized guidelines" for conducting analysis that is already required). Accordingly, the sponsor introduced the bill in order to "simply reaffirm the Airport Land Use Planning Handbook and other documents as available resources for analyzing noise and safety issues." MJN, Exh. J, p. 3.

This history also demonstrates that the Legislature did not perceive the distinction that the *Baird* cases and CBIA make between analyzing the effects of a project on the environment and analyzing impacts of the environment on a project. Rather, the Legislature recognized that exposing new people to safety and noise risks from an existing airport constitutes a significant impact *on* the environment. The Legislative Counsel's Digest described how "[t]his bill would require a lead agency to follow specified procedures relative to safety hazards and noise problems" when complying with "[e]xisting law . . . [which] requires a public lead agency, as defined, to prepare an environmental impact report on a project . . . that may have a *significant effect on the environment.*" MJN, Exh. M. *See also* MJN, Exh. J, p. 2 (block quoted above).

2. Health and Safety Impacts at Schools.

As with impacts from airports, the Legislature has identified the technical method agencies must use when evaluating impacts to schools located near sources of hazardous waste or air pollution. § 21151.8 (a)(1),

(a)(2) (identifying the types and locations of potentially hazardous facilities that may pose a risk to a proposed school and a process for working with air districts and other agencies to obtain this information). The section then goes further, prohibiting the location of schools where existing sources of toxics would pose unacceptable health risks unless the district can demonstrate there is no "alternative site that is suitable due to a severe shortage" of alternative sites. § 21151.8 (a)(3)(C).

This limitation on agencies' ability to approve school sites is significant because, as a general rule, CEQA does not prohibit the approval of a project, but allows them to go ahead even if they will have significant environmental impacts. Kostka & Zischke, §1.1, p. 2. However, in the case of school siting, the Legislature determined the potential impacts from existing adverse environmental conditions are important enough to actually limit school construction when their location poses significant health risks.

The legislative history for this provision does not explicitly address whether the Legislature believed it created an exception to CEQA's general requirements or merely specified how agencies must undertake their preexisting duties. However, the history does show that the drafters thought the bill would simply "[p]rovide[] greater specification . . . regarding . . . what must be included in the EIR" and "would result in no additional costs to the state." MJN, Exh. N. The history of this uncontroversial bill thus indicates that the section was intended to provide

more specificity with respect to analysis that was already required by CEQA and did not turn CEQA "on its head," as CBIA now alleges. CBIA Br., p. 4.

3. Exemptions for Housing Development.

CEQA exempts various types of housing projects from environmental review. However, the exemptions do not apply to projects located on sites that will expose future project residents to a significant risk of harm from flooding, earthquakes, wildfire, or exposure to harmful materials from surrounding properties. *See, e.g.*, § 21155.1(a)(6) (exemption for "transit priority projects" does not apply if project site is subject to unusually high risk of fire or explosion from materials stored or used on nearby properties, risk of an excessive public health exposure, or unmitigated wildland fire, seismic, landslide, or flood risk); § 21159.21(f) (applying same standards to exemption for "qualified housing projects"); § 21159.22(b)(3) (same for agricultural employee housing); § 21159.23(a)(2)(A) (same for low-income housing); § 21159.24(a)(3) (same for urban, infill housing).

These criteria were specifically "intended to ensure that the project has no apparent significant environmental impacts." MJN, Exh. O, p. 5 (SB 375, creating 21151.1). *See also* MJN, Exh. P, p. 3 (history for SB 226 (2012), which provided new exemptions for infill projects, described how existing law "[e]xempts from CEQA specified residential housing projects

which meet criteria established to ensure the project does not have a *significant effect on the environment.*") (emphasis added). By refusing to exempt from CEQA projects that would expose people to adverse environmental conditions, these provisions demonstrate the legislative understanding that exposing people to such conditions is a potentially significant environmental impact.

4. CBIA's Reliance On the Legislative History of Recent, Un-enacted Bills Is Misplaced.

CBIA claims that bill analyses for SB 617 and AB 953, which were introduced in the 2013 legislative session but were not passed, indicate that the Legislature knew that CEQA did not require analysis of exposing people to adverse environmental conditions and declined to expand the law's reach. CBIA Br., pp. 37-39. As this Court has repeatedly held, however, "'[t]he unpassed bills of later legislative sessions evoke conflicting inferences . . . [and] [a]s evidence of legislative intent they have little value.'" *Grupe Development Company v. Superior Court* (1993) 4 Cal.4th 911, 923 (citation omitted). *See also People v. Mendoza* (2000) 23 Cal.4th 896, 921 ("[T]he Legislature's failure to enact a proposed statutory amendment may indicate many things other than approval of a statute's judicial construction, including the pressure of other business, political considerations, or a tendency to trust the courts to correct its own errors.").

These rules are particularly apt here. Although these bills would have modified CEQA's definition of "environment" and "significant effect on the environment" to ensure that agencies analyze the health and safety impacts of exposing people to adverse environmental conditions, legislators held very different views on whether the bills would clarify or change existing law. Bill supporters believed that the bill would *not* expand CEQA, but merely clarify existing law:

> This bill fixes the misguided decision in Ballona Wetlands Trust, in which a court decided that environmental review could not take into account the effects of the physical environment on the project. That decision could lead to projects being built on floodplains, areas of high seismic activity, or areas of high wild[fire] risk - without these risks even being permitted to be discussed in the environmental review.

MJN, Exh. Q, p. 7; *See also* CBIA MJN, Ex. C, p. 3 ("SB 617 addresses the court's decision in *Ballona Wetlands* Trust by *clarifying* that project reviews must take into account the physical environment on a given project") (emphasis added).

Opponents of the bill, on the other hand, cast the measure as an "attack on the core of the CEQA . . . [because] CEQA requires consideration of the impacts of a project on the environment, not the other way around." MJN, Exh. Q, p. 8. They therefore viewed the bill as an unwarranted expansion of the law.

Given the differing opinions about the effect of these bills, it is impossible to draw any meaningful conclusion from statements in a few legislative analyses indicating that the bills would "additionally require" analysis of the impacts of exposing people to adverse environmental conditions. *See* CBIA Br., p. 38. In fact, other statements in those same analyses indicate that CEQA already requires this type of analysis and that agencies already perform it. CBIA MJN, Ex. E, p. 2 (the "CEQA Guidelines *require lead agencies to consider the effects of hazardous or adverse environmental conditions on a proposed project* . . . [and this type of] analysis *is typically used* to evaluate and address problems caused by bringing people and new development to areas with poor air quality, incompatible land uses, or hazardous conditions"); CBIA MJN, Ex. D, p. 2 ("this analysis is *currently required* by the current CEQA Guidelines (§15126.2(a)), which are adopted regulations, despite recent litigation . . . and it is reasonable to assume that at least some agencies may already be doing this analysis") (all emphases added).

Legislative history is only relevant to the extent a court can "ascertain the intent of the Legislature as a whole." *Quintano v. Mercury Casualty Company* (1995) 11 Cal.4th 1049, 1062. Here, there is no indication whether the Legislature as a whole viewed the bills as expanding CEQA or as maintaining the status quo, which had only been distorted by erroneous rulings such as *Ballona*. The bills' histories are therefore useless

in interpreting CEQA's preexisting statutory language. *See Marina Point, Ltd. v. Wolfson*, 30 Cal.3d 721, 735, fn. 7 (1982) (refusing to take notice of unenacted bills' histories); *Grupe Development Company*, 4 Cal.4th at 922-23 (same).

By contrast, all of the relevant indicia of statutory intent demonstrate that the Legislature intended for CEQA to encompass impacts resulting from the exposure of people to adverse environmental conditions. As the paramount goal of the courts is to interpret CEQA broadly consistent with its statutory language, this Court should find that CEQA requires analysis of "how existing environmental conditions will impact future residents or users (receptors) of a proposed project" where those conditions may cause substantial adverse impacts to humans, either directly or indirectly.

II. This Court Should Overrule *Baird* and Subsequent Cases.

Although CBIA claims this case turns on the plain language of CEQA, for the most part, its argument relies on four appellate decisions finding that CEQA does not require agencies to analyze the impacts of the environment on a project. These decisions are notably lacking in any meaningful attempt to ascertain the Legislature's intent and to interpret the statute consistent with its purposes. The first two cases failed to even acknowledge that the CEQA Guidelines explicitly required the analysis that they found outside the scope of CEQA. And, none of the cases addressed either the Resources Agency's explanation for its Guidelines or the

legislative history of numerous CEQA provisions demonstrating that the statute does require analysis of exposing people to adverse environmental conditions. Moreover, the *Baird* cases did not even need to reach the issue for which CBIA cites them. Ultimately, all of the *Baird* cases are unpersuasive and should be overturned to the extent they purport to limit CEQA's requirement to address the impacts of exposing project residents or users to adverse environmental conditions.

A. The *Baird* Cases Are Not Consistent with this Court's Direction that CEQA Be Interpreted Broadly to Effect Its Purposes.

1. The Early *Baird* Cases Did Not Address CEQA's Statutory Language or the CEQA Guidelines.

The first case to hold that CEQA does not require analysis of exposing project residents to adverse environmental conditions involved the adoption of a negative declaration for a residential drug treatment facility. *Baird,* 32 Cal.App.4th at 1466-67. Neighboring landowners sued and argued the county should have prepared an EIR to address the exposure of future project residents to contamination that allegedly existed near the project site. *Id.* at 1467. The court disagreed because there was no evidence that the facility in question would change the alleged preexisting contamination: "[t]o require an EIR in the present context, where the proposed project is challenged on the basis of preexisting environmental conditions rather than an adverse change in the environment, would impose

a requirement beyond those stated in CEQA or its guidelines, and is thus prohibited." *Id.* at 1469.

In reaching this conclusion, the court ignored section 21083(b)(3), which states that a project will have a significant impact on the environment if its environmental effects will cause substantial adverse effects on human beings. It also ignored Guidelines section 15126, which at that time—as section 15126.2 does now—required agencies to conduct the exact type of analysis the *Baird* court held was not required. Guide to CEQA, pp. 440-42. The decision was therefore incorrect that analyzing whether existing conditions may affect future residents would impose a requirement "beyond those stated in CEQA or its guidelines." *Baird,* 32 Cal.App.4th at 1469.

CEQA practitioners were critical of the *Baird* decision. As a leading CEQA treatise states: "if taken literally, [*Baird*] would conflict with numerous CEQA Guidelines provisions that, taken together, embody *long-settled principles* requiring environmental documents to address potential problems that 'the environment . . . might create for new development.'" Guide to CEQA, p. 440 (citation omitted) (emphasis added). *See also* 9 Miller & Starr, Cal. Real Estate (3d ed. 2007) § 25A:7, p. 25A-27 – 25A-28 (noting that *Baird* "did not cite or refer to" section 21083(b)(3) and that "[i]t is at least arguable that the introduction of construction activities and human beings into a potentially dangerous, but previously uninhabited, area

would constitute a 'change' in the existing environment that is 'adverse' within the meaning of [CEQA]"). For this reason, the decision was interpreted as merely reflecting "judicial impatience with a lawsuit that appears to have been filed mainly for social, rather than environmental, purposes." Guide to CEQA, p. 441.

Likewise, in 2009, the Resources Agency did not find *Baird* controlling when it revised Guidelines section 15126.2 to add language stating that an "EIR should evaluate any potentially significant impacts of locating development in other areas susceptible to hazardous conditions." As the Resources Agency noted, *Baird* involved a situation in which there was no evidence that a project would expose anyone to alleged preexisting contamination. MJN, Exh. R, pp. 43, 103. In contrast, the agency described how its guidance focused "on the potential *interaction* between the project and the hazard." MJN, Exh. S, p. 3 (Response 13-3) (emphasis added).

The appellate courts also declined to follow or apply *Baird* for many years. In fact, the next case to address whether CEQA requires an analysis of exposing people to adverse environmental conditions–*L.A. Unified,* 176 Cal.App.4th at 895, 900–did not mention *Baird* at all. There, the petitioner challenged an EIR for construction of a high school near a freeway and other sources of air pollution. As part of its environmental review, the school district prepared a health risk assessment that evaluated impacts to

students and staff caused by locating the school within a quarter mile of sources of hazardous emissions, as required by section 21151.8. *Id.* at 900. Petitioner argued that the school district should have also analyzed the *cumulative* impact that air pollution sources outside these boundaries would have on student and staff health. The court rejected this argument, and found that the geographic scope of the District's analysis was adequate to address both project specific and cumulative impacts. *Id.* at 911-12.

Before reaching this conclusion on the merits of petitioner's claims, however, the court "digress[ed] first to make the point that generally, '[t]he purpose of an environmental impact report is to identify the significant effects *on the environment* of a project . . . not . . . the environment on the project . . . .'" *Id.* at 905 (citing § 21002.1(a)) (emphasis in original). CBIA latches onto this statement as making a "careful distinction" between CEQA's specific mandate to analyze the effects of environmental conditions on project users under 21151.8, and the alleged "absence of any such duty under CEQA generally." CBIA Br., p. 22. The court made no such careful distinction. To the contrary, as in *Baird*, the *L.A. Unified* court simply ignored both the CEQA Guidelines and CEQA's legislative history when digressing to address CEQA's scope. Moreover, the court seemed to accept that agencies must analyze the impacts of adverse environmental conditions on future project users when it ruled that the EIR properly analyzed the impact of existing traffic on future students. 176 Cal.App.4th

at 914-16 (upholding EIR's finding that student "pedestrian safety impacts would be reduced to less than significant levels" with mitigation).

2. The *Baird* Cases Do Not Provide A Reasoned Basis For Overturning Guidelines Section 15126.2.

The most recent decisions to address the issue presented here—*SOCWA,* 196 Cal.App.4th at 1608-09, and *Ballona,* 201 Cal.App.4th at 473-74—provided only marginally more in-depth analysis. In *SOCWA* the court rejected the claim that Dana Point should have prepared an EIR to evaluate odor impacts from a nearby sewage treatment plant on future residents. 196 Cal.App.4th at 1615, 1617. *Ballona* found that the City of Los Angeles was not required to evaluate the impacts of sea level rise on a residential project and its future residents. 201 Cal.App.4th at 474. Although both *SOCWA* and *Ballona* acknowledged Guidelines Section 15126.2, they rejected it as inconsistent with CEQA. *SOCWA,* 196 Cal.App.4th at 1617 ("[t]he Legislature did not enact CEQA to protect people from the environment."); *Ballona,* 201 Cal.App.4th at 474 (same). CBIA echoes this holding in its brief. CBIA Br., pp. 25-26.

In dismissing the Guidelines as contrary to CEQA, however, neither *SOCWA* nor *Ballona* analyzed CEQA's legislative history or the Resources Agency's explanation of how the Guidelines fulfill CEQA's requirement that agencies evaluate the direct and indirect impacts of projects on humans. Although the *SOCWA* court twice quoted CEQA's fundamental

purpose to provide "a decent home and suitable living environment for every Californian" (196 Cal.App.4th at 1613), it ignored that this purpose supports interpreting CEQA to require analysis of the impacts that adverse environmental conditions will have on project residents. Likewise, these courts' narrow interpretations of CEQA's definitions of "environment" and "significant effect on the environment" are not consistent with this Court's directive that CEQA be interpreted broadly to effect is purposes. By focusing only on whether the project changes the adverse environmental condition, the *Baird* cases miss the change that the projects actually cause—bringing people to an area where they will be exposed to environmental conditions—and the adverse consequences that flow from that change. *See, e.g., SOWCA,* 196 Cal.App.4th at 1615 (addressing whether project would change odors from the sewage treatment plant rather than the changes resulting from bringing people to the area).

As demonstrated above, CEQA can, and should, be construed to mean that a project will have a significant effect on the environment if it changes the physical conditions at a site by bringing people to that site, and therefore exposes them to existing or reasonably foreseeable adverse environmental conditions. Moreover, the Resources Agency's consistent interpretation of CEQA to require this analysis belies CBIA's claim that the Resources Agency ignored *Baird* and first "distorted the purpose of CEQA" when it revised the Guidelines in 1998. CBIA Br., p. 27-28. To the

contrary, *Baird* ignored relevant CEQA Guidelines and statutory provisions and initiated the legal uncertainty that gave rise to this case. This Court should reject the *Baird* cases, not Guidelines section 15126.2.

B. The *Baird* Cases Could Have Been Resolved By Applying CEQA's Plain Language Rather Than Making Sweeping Pronouncements About the Law's Scope.

CBIA claims that if this Court overturns the *Baird* cases, there will be no "principled distinction prevent[ing] CEQA from invading every aspect of project development." CBIA Br., p. 4. CBIA's alarm is unwarranted; CEQA's plain language already limits the scope of any required analysis. Moreover, the facts of the *Baird* cases themselves demonstrate that requiring analysis of exposing people to adverse environmental conditions will not expand CEQA to encompass every possible environmental impact. Accordingly, those courts should have resolved the cases by applying CEQA's well-established limits instead of reaching out to create a new legal doctrine.

1. CEQA's Plain Language Establishes the Scope of the Requirement to Evaluate Impacts Associated with Exposing People to Adverse Environmental Conditions.

CEQA only requires analysis of "substantial adverse" effects on humans. § 21083(b)(3). Agencies must base their determination that an impact is substantial and adverse "on substantial evidence in light of the whole record" before the agency. § 21082.2 (a). That some people may

disagree with an agency's determination or that there is public controversy over the location of a project does not constitute substantial evidence. § 21082.2(b). Rather, evidence consists of "fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact." § 21080(e). It does not include "argument, speculation, unsubstantiated opinion or narrative, [or] evidence that is clearly inaccurate or erroneous." *Id*; *see also Apartment Association of Greater Los Angeles v. City of Los Angeles* (2001) 90 Cal.App.4th 1162, 1176 (opinions "which say[] nothing more than 'it is reasonable to assume' that something 'potentially . . . may occur' [do not] constitute[] substantial evidence").

As the Resources Agency described when it revised Guidelines section 15126.2 in 2009, these limits mean that agencies will not need to discuss every possible way in which environmental conditions may harm people. For example, agencies need not analyze the impacts that climate change might have on the health of future project residents if those impacts are speculative or if they are unrelated to the project being built in a particular location. MJN, Exh. S, p. 2. Similarly, agencies need not analyze the impacts that an adverse environmental condition will have on a project "if the potential hazard would likely occur sometime after the projected life of the project." *Id.* (e.g., impacts of sea level rise fifty years from now are irrelevant if a project has a five-year lifespan). *See also*

MJN, Exh. R, p. 42 (describing how "[s]everal limitations apply to the analysis of future hazards").

Finally, the impact must be fairly encompassed by CEQA as an *environmental* impact. The Guidelines identify a number of potential environmental impacts that would be relevant when evaluating impacts to future residents or users of a project. These include: health impacts from air pollution and hazardous chemicals, noise, flooding, geologic instability (such as earthquakes or landslides), and wildfire. CEQA Guidelines § 15126.2 (a); App. G, §§ III (d) (expose sensitive receptors to substantial pollution concentrations), III (e) (odors), VI (a) (identify risks from geologic/soil hazards, such as landslides, earthquakes, liquefaction), VIII (e) (safety impacts from location near airport), VIII (h) (expose people to wildfire risk), IX (i) (expose people to risk of flood), IX (j) (pose threat of inundation by seiche, tsunami, or mudflow), XII (e), (f) (exposure to noise from airports).

All of these types of impacts meet the standard set out in *Martin v. City and County of San Francisco* (2005) 135 Cal.App.4th 392, 403: CEQA applies only to a "physically perceivable reality. The major statutory emphasis is on matters that can be seen, felt, heard, or smelled." Indeed, if a project were to cause any of these impacts directly, they would be subject to analysis under CEQA. *E.g., Berkeley Jets,* 91 Cal.App.4th at 1367-71, 1382 (agency must analyze project's TAC and noise impacts to surrounding

community); *River Valley Preservation Project v. Metropolitan Transit Development Board* (1995) 37 Cal.App.4th 154, 177-78 (agency must analyze how a project will impact flooding on surrounding land). Accordingly, agencies should also analyze whether these types of impacts will have a substantial, adverse impact on future project residents.

2. The *Baird* Cases Could Have Reached the Same Result By Applying CEQA's General Requirements.

In each of the *Baird* cases, the court could have concluded that CEQA did not require the analysis demanded by petitioners based on the application of CEQA's general requirements to the evidence in those cases. Specifically, the *Baird* court could have ruled that no EIR was required because no substantial evidence supported a fair argument that the contamination would cause significant health impacts. 32 Cal.App.4th at 1468, fn. 1 (the alleged contamination, if it existed at all, was located between 700 and 2000 feet from the project site). Similarly, in *Ballona Wetlands* the court found substantial evidence supported the City's finding that the "project would not be subject to inundation as a result of sea level rise resulting from global climate change." 201 Cal.App.4th at 476. This finding should have disposed of petitioners' claim that the EIR did not adequately evaluate this impact; after all, there is no need to analyze impacts that will not occur.

In both *SOCWA* and *L.A. Unified*, the agencies actually conducted the analysis that the courts eventually found was not required. Specifically, in *SOCWA* Dana Point actually "had taken into account the possible effects of the proximity of the SOCWA sewage plant, by requiring a buffer zone between the plant and future structures, visual screening, air conditioning, and notifications in escrow instructions." 196 Cal.App.4th at 1610-11. And, in *L.A. Unified,* the school district had analyzed health impacts to students and staff from sources of toxic emissions within a one-quarter mile radius of the proposed school, and the court upheld this analysis on the merits. 176 Cal.App.4th at 900, 911-12.

Finally, in *Parker Shattuck Neighbors v. Berkeley City Council* (2013) 222 Cal.App.4th 768—the most recent case to address *Baird*—the court refrained from determining the validity of that line of cases. There, the court addressed a claim that the city should have prepared an EIR for a mixed use development because the project would cause significant impacts by exposing future project workers and residents to toxic contamination in the soil. *Id.* at 777-78. The court acknowledged *Baird*, but found it inapplicable because the project at issue, unlike in *Baird*, would *disturb* the existing, contaminated soil, thereby constituting a physical change that might cause a cognizable impact under CEQA. *Id.* at 779-80. Ultimately, however, the court ruled that there was no substantial evidence supporting a fair argument that the project would cause significant

health risks to the workers and residents. *Id.* at 784-85. Although the court entertained the idea that CEQA generally would not require this analysis, it ultimately declined to "decide the issue here." *Id.* at 782.

This refusal in *Parker Shattuck* to decide the issue was clearly correct and avoided the problem set in motion by *Baird* when it made a broad pronouncement about the requirements of CEQA that was not supported by the law or required by the facts of the case.

C. Compliance with Other Laws Does Not Substitute for Compliance with CEQA.

Both *SOCWA* and *Baird* assert that CEQA is not necessary to address exposure to adverse environmental conditions because "[o]ther statutes, ordinances, and regulations fulfill that function." *SOCWA,* 196 Cal.App.4th at 1617; *Baird,* 32 Cal.App.4th at 1469. In support of this position, CBIA expends six pages of its brief listing statutes that purportedly replace the need for CEQA. CBIA Br. at 44-49.

This Court has expressly rejected the notion that other laws supplant CEQA: "[i]n analyzing the application of CEQA to an agency already charged by another act with environmental responsibilities, we recently recognized that these acts *should be harmonized and CEQA applied.*" *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 198 (emphasis added); *see also Neighbors for Smart Rail,* 57 Cal.4th at 462 ("an EIR must be judged on its fulfillment of CEQA's mandates, not those of other statutes");

CBE, 103 Cal.App.4th at 111-14 (invalidating former Guidelines section 15064(h), which directed agencies to find an impact was not significant if it complied with other laws or regulations, because compliance with other laws is not a substitute for CEQA review).

As CBIA itself concedes, "CEQA provides protections that a review process outside of CEQA does not." Petition for Review, p. 7. This is because "CEQA['s] requirements serve very specific and important purposes" that are not covered by other environmental laws. *Wildlife Alive,* 18 Cal.3d at 197 (noting that CEQA, unlike other laws, requires analysis of alternatives and public disclosure of information that is subject to judicial review). For example, in contrast to the laws of general application that CBIA cites, CEQA ensures that agencies analyze site-specific impacts and alternatives. *Compare* CBIA Br., p. 48 (Federal Insecticide, Fungicide, and Rodenticide Act generally regulates pesticide use), *with Ebbetts Pass Forest Watch v. California Department of Forestry and Fire Protection* (2008) 43 Cal.4th 936, 956 ("the fact a sister agency had assessed the environmental effects of various herbicides *in general* and registered them for use did not excuse CDF from assessing those herbicides' use *as part of a particular timber harvest plan*" under CEQA, and analyzing alternatives to their use) (emphasis in original).

Similarly, the Alquist-Priolo Earthquake Fault Zoning Act and other seismic safety laws do not require agencies to analyze project alternatives.

Compare Cal. Code Regs, tit. 14, § 3724 (requiring agencies to mitigate seismic-related safety impacts, but not to analyze alternatives) *with California Oaks Foundation*, 188 Cal.App.4th at 264, 276 (agency imposed mitigation to comply with seismic safety laws and CEQA, but also analyzed alternative project sites to comply with CEQA). Nor do they provide the same level of public disclosure that CEQA requires. Unlike Alquist-Priolo, which "does not dictate particular procedures the agency must follow when approving a project" (*id.* at 250), CEQA requires agencies to follow detailed procedures to inform themselves and the public of a project's impacts (*e.g.*, §§ 21081, 21082.2(a)). Even if CBIA were correct that a property owner is more likely to read real property disclosures than an EIR (CBIA Br. at 45), such retrospective disclosure cannot substitute for CEQA's mandate that public agencies analyze, disclose and mitigate significant project impacts *before* a project is approved. § 21002.1(a); *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 130.

CBIA also claims that general plan policies adequately protect residents from environmental effects, such as excessive noise. CBIA Br., p. 46. But courts have repeatedly held that "conformity with a general plan does not insulate a project from EIR review where it can be fairly argued that the project will generate significant environmental effects." *Oro Fino Gold Mining Corporation v. County of El Dorado* (1990) 225 Cal.App.3d

872, 881-82 (compliance with General Plan's noise policies does not necessarily render project's noise impacts insignificant); *see also City of Antioch v. City Council* (1986) 187 Cal.App.3d 1325, 1332 ("there is no indication in CEQA that mere conformity with the general plan will justify a finding that the project has no significant environmental effect").

In sum, other laws provide additional protections but do not replace CEQA's unique analysis, disclosure, and mitigation requirements. If CBIA believes that CEQA should exempt projects whose impacts are already regulated by other laws, it is free to ask the Legislature to amend the law in this manner. But as CBIA itself emphasized, "the Legislature knows how to grant an exemption and if it has not done so, it is not the place of the courts to imply one." Petition for Review, p. 5.

D. Analyzing and Mitigating the Impacts of Adverse Environmental Conditions Would Not Require Unconstitutional Mitigation.

The *SOCWA* court expressed concern that requiring agencies to adopt mitigation addressing the *source* of an impact would "stick" project applicants with the bill for impacts they did not cause. 196 Cal.App.4th at 1614; *see also* CBIA Br., p. 42, fn. 10. This concern is addressed by CEQA itself. First, the impacts at issue here are associated with bringing people to an existing environmental condition. Therefore, mitigation can be focused on changes to the project under review, such as setbacks, buffers, or improved earthquake safety measures that limit the effect of

exposing new residents to that adverse condition. *See, e.g., SOCWA*, 196 Cal.App.4th at 1610-11 (addressing odor-related impact of locating new residents near sewage plant by requiring setbacks); *L.A. Unified*, 176 Cal.App.4th at 900-01 (addressing air quality impact of locating school near sources of air pollution by requiring building setbacks and enhanced filtration).

Agencies may also address the source of particular impacts in at least some circumstances. When confronted with multiple projects that contribute to an environmental impact, agencies often require project proponents to pay their fair share toward addressing the impact, instead of having them pay the entire cost of the mitigation. *See, e.g., Save Our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99, 137-142 (upholding traffic mitigation program that required project proponents to contribute their share of mitigating increased traffic). Thus, Dana Point might have required the developer to contribute a portion of the cost of covering the sewage treatment plant, based on the amount of sewage that the project would contribute to the plant.

Finally, even where some principle of law precludes an agency from adopting mitigation for a significant impact, "such preclusion would not excuse the [agency] from performing the realistic assessment of environmental effects CEQA demands." *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48

Cal.4th 310, 325. This Court's statement reflects that CEQA's core purpose is to provide the public and decision makers with *complete* information regarding a project's impacts. § 21002.1(a); Guidelines § 15063(b)(1). It is only after fully analyzing both the benefits and risks of approving development that decision makers and the public can intelligently weigh the competing policy concerns. Guidelines § 15021(d). If, after such consideration, agencies believe that the benefits of new development outweigh its risks, they are free to approve such projects notwithstanding any significant health impacts. § 21081; Guidelines §§ 15021(d), 15043. CBIA's interpretation of CEQA would eliminate this essential function for a range of environmental impacts that adversely affect humans. This Court should reject such a result as being inconsistent with the plain language of CEQA, the interpretation of the regulatory agency charged with implementing CEQA, and this Court's directives about the law's broad purposes.

III. The Court Should Uphold the Air District's Receptor Thresholds Regardless of How It Rules on the Broader Question of CEQA's Scope.

A. CBIA Bears the Burden of Demonstrating the Thresholds Are Invalid in All of Their Applications.

CBIA's lawsuit challenges the Air District's mere adoption of the Thresholds, not their application in any particular instance. CT 4:1092-93. A facial claim such as this "is 'the most difficult challenge to mount

successfully, since the challenger must establish that no set of circumstances exists under which the [law] would be valid.'" *T.H. v. San Diego Unified School District* (2004) 122 Cal.App.4th 1267, 1281 (citation omitted). CBIA asserts that this standard only applies to facial *constitutional* challenges and that courts have not applied it to CEQA. Petition for Review, p. 24. Instead, CBIA claims, this Court must determine whether the challenged Thresholds are "'clearly unauthorized or erroneous under CEQA.'" *Id.* (quoting *CBE,* 103 Cal.App.4th at 109). CBIA's argument is unavailing.

Courts routinely apply the facial standard described above when adjudicating claims that an agency's action conflicts with state statutes. *T.H.,* 122 Cal.App.4th at 1281(facial claim that administrative regulation violated both state law and the constitution); *Sierra Club v. Napa County Board of Supervisors* (2012) 205 Cal.App.4th 162, 173-74 (facial claim that local ordinance conflicted with state law); *Association of California Insurance Companies v. Poizner* (2009) 180 Cal.App.4th 1029, 1054 (facial claim that statewide regulations conflicted with state law). The *CBE* decision, relied upon by CBIA, did not explicitly cite this standard but effectively applied it. Specifically, the *CBE* court invalidated Guidelines that *required* lead agencies to use an approach that flatly conflicted with CEQA (103 Cal.App.4th at 115 (Guidelines § 15064(h))), but it upheld other Guidelines that arguably *allowed* lead agencies to use a prohibited

approach because agencies could apply them in a manner consistent with CEQA (*id.* (Guidelines § 15064(i)(3))).

Likewise here, because the Thresholds can be applied consistent with CEQA, they must be upheld, regardless of this Court's ruling on the question presented.

B. CBIA's Facial Challenge Fails Because the Receptor Thresholds Can Be Validly Applied in Numerous Situations.

1. Agencies May Use the Challenged Thresholds to Carry Out Specific CEQA Provisions.

First, agencies may use the TAC Receptor Thresholds when determining whether the location of a proposed school site "will [] constitute an actual or potential endangerment of public health to persons who would attend or be employed at the proposed school," as required by section 21151.8(a)(3)(B)(i). Because the law does not provide a standard for making this endangerment determination, agencies may use the Air District's Thresholds to do so.

CBIA claims that agencies cannot use the Thresholds in this circumstance because they are inconsistent with the "unique and detailed statutory requirements for school siting" set forth in section 21151.8. CBIA Br., p. 43. But the only difference CBIA mentions is that CEQA requires agencies to consider impacts from TAC sources within 1,320 feet (a quarter mile) of a school site, whereas the Air District recommends

considering impacts from sources within 1,000 feet. *Id.*; *see also* AR 1:6 (listing Thresholds). This difference is hardly consequential. In any event, the Air District recognized that lead agencies may expand the recommended 1,000 foot distance where conditions warrant. AR 4:876, 882. Agencies could therefore use the Air District's recommended threshold levels for increased cancer risk, non-cancer risk, or $PM_{2.5}$ exposure to asses health risks from sources within 1,320 feet, instead of 1,000 feet, of a proposed new school. AR 1:6.

Second, agencies may use the TAC Receptor Thresholds to determine whether certain CEQA exemptions apply. For example, transit-oriented housing projects are exempt from CEQA review, but only if the lead agency determines that there is not: (1) a "[r]isk of a public health exposure" on the project site, or (2) an unmitigated "potential for exposure to significant hazards from surrounding properties." § 21155.1(a)(4)(B), (6)(C). *See also* §§ 21159.21(f), (h) (applying same criteria for "qualified housing projects"); 21159.22(b)(3) (for agricultural employee housing); § 21159.23(a)(2)(A) (for low-income housing); § 21159.24(a)(3) (for urban, infill housing). Accordingly, agencies could use the TAC Receptor Thresholds to determine whether a project may cause risk of a public health exposure due to TAC hazards from surrounding properties, and thus whether an exemption applies.

Third, agencies may use the TAC Receptor Thresholds to determine whether a project's own TAC emissions will have a significant cumulative impact when combined with other existing sources of TACs. CBIA claims that this "is not a *receptor* issue, it is a *source* issue." CBIA Br., p. 42. However, many projects will be both sources and receptors—*e.g.*, new housing developments will expose new residents to existing pollution and will also contribute to it by causing vehicle trips that emit TACs. It makes no sense to evaluate whether a new project's TAC emissions will have a significant cumulative impact on *surrounding* residents, but ignore the exact same impact on the Project's own residents.

Fourth, agencies may use the Thresholds to determine whether a project is inconsistent with a general plan's policies to protect new residents from existing TACs. CBIA claims such analysis will be unnecessary if this Court rules that exposing people to adverse existing conditions is not an "impact on the environment" under CEQA. CBIA Br., p. 43 (agencies need only analyze plan inconsistency if the inconsistency is evidence of a significant "impact on the environment"). But CBIA's cited authority does not support its argument. The court in *Lighthouse Field Beach Rescue v. City of Santa Cruz* (2005), 131 Cal.App.4th 1170, 1207, held that an inconsistency between a project and relevant land use policies "does not in itself *mandate* a finding of significance," but acknowledged that an inconsistency is "a factor to be considered in determining whether a

particular project may cause a significant environmental effect." (emphasis added.) Accordingly, where agencies have adopted policies to address TAC exposures to future residents, they may rely on the Thresholds when considering whether a conflict with this policy will "cause substantial adverse effects on human beings," as required by CEQA. § 21083(b)(3); *see also* Guidelines § 15125(d) ("an EIR shall discuss *any* inconsistencies between the proposed project and applicable general plans") (emphasis added).

2. Agencies May Choose to Employ the Challenged Thresholds Even if CEQA Does Not Require Them to Analyze the Impacts of Exposing Project Residents to Adverse Environmental Conditions.

Even if this Court finds that CEQA does not generally *require* agencies to analyze the impacts that existing sources of TACs would have on a project's users or residents, there is nothing in CEQA that *prohibits* agencies from conducting this analysis. This Court and others have repeatedly acknowledged that agencies regularly and lawfully exercise their discretion to take measures in excess of what CEQA strictly requires. For example, in *Neighbors for Smart Rail,* 57 Cal.4th at 445, petitioners challenged the Authority's EIR for a light rail project on the ground that the agency improperly measured the project's impacts against a baseline of projected future conditions, rather than existing conditions. This Court ruled that the Authority erred in using the future conditions baseline, but

went on to add: "nothing in CEQA law precludes an agency, as well, from considering both types of baseline—existing and future conditions—in its primary analysis of the project's significant adverse effects." *Id.* at 454; *see also Committee for Green Foothills,* 48 Cal.4th at 41, 51 (agency elected to issue a Notice of Determination even though CEQA did not mandate or even discuss the use of such a notice in this situation); *L.A. Unified,* 176 Cal.App.4th at 900 (school district's EIR analyzed air quality impacts from TAC sources located outside of the radii required by law).[7]

Allowing agencies to analyze environmental health issues that exceed CEQA's minimum requirements, and to use the TAC Receptor Thresholds when doing so, fits perfectly with the law's purposes to protect the "health and safety of the people of the state" in order to provide "a decent home and suitable living environment for every Californian." §§ 21000(d), 21001(d). It also fits with the law's purpose to "protect[] not only the environment but also informed self-government." *Sierra Club,* 7 Cal.4th at 1229 (citation omitted).

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[7] In his CEQA treatise, CBIA's counsel also emphasizes that agencies may wish to provide greater analysis in their EIRs than required by law. Kostka & Zischke, §§12.28, 12.29, p. 609 ("it may be desirable in some cases to discuss plan policies that are not legally applicable"), 12.30, p. 610 ("agencies may find it useful" to discuss consistency with zoning regulations even though "an EIR is not required to discuss" such issues), 12.35, p. 614 (recommending methods for agencies to analyze plan consistency that "go beyond the requirements of the CEQA Guidelines").

CBIA asks this Court to "set aside" the Receptor Thresholds (CBIA Br., p. 5) because they compel agencies to act in a manner contrary to CEQA (*id.*, pp. 4 (Thresholds "*require*" mitigation), 7 (Thresholds "indirectly *regulate*" development) (emphases added)). This characterization is incorrect. The Thresholds CBIA challenges are not legally binding. They are recommendations. As the Court of Appeal ruled, "No public agency other than the District is committed to using the Thresholds, and the District does not act as the lead agency for the type of residential and commercial projects CBIA" is concerned with. Opinion, p. 17. *See also* Guidelines § 15064.7(a) (thresholds set level at which an impact will "normally" be significant); *CBE*, 103 Cal.App.4th at 111-113 (invalidating former Guideline section 15064(h), which would have made thresholds binding rather than permissive); AR 28:6232 (Air District states that "[t]he thresholds are recommendations to Lead Agencies . . . [and] [i]t is [up to] the Lead Agency's discretion to use the recommended thresholds").

Given the Thresholds' nature and unquestionable utility in particular circumstances, this Court should leave them in place even if it determines that CEQA does not generally require agencies to analyze the impacts of exposing project residents or users to adverse environmental conditions. Under CEQA, courts only invalidate agency decisions "if the manner in which an agency failed to follow the law is shown to be prejudicial...."

Environmental Protection Information Center v. California Department of Forestry and Fire Protection (2008) 44 Cal.4th 459, 485 (citation omitted). Here, the Air District's adoption of the TAC Receptor Thresholds was not prejudicial because the Thresholds do not require agencies to apply them at all, much less in a manner that violates CEQA.

In fact, as the foregoing discussion demonstrates, CEQA requires the analysis, disclosure, and mitigation of impacts from exposing people to high levels of air pollution. The Thresholds are designed to assist agencies in conducting this analysis and should be upheld However, even if the Court rules in favor of CBIA on the issue presented, the appropriate remedy would be to provide a declaration of the law but to leave the challenged Thresholds in place.

CONCLUSION

The Air District respectfully requests that the Court declare CEQA requires analysis of "existing environmental conditions" where they may have substantial adverse impacts on "future residents or users of a project," and uphold the Air District's Receptor Thresholds as complying with this requirement.

DATED: February 24, 2014 SHUTE, MIHALY & WEINBERGER LLP

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CERTIFICATE OF WORD COUNT

I certify that this answer, exclusive of this certificate and the tables of contents and authorities, contains 13,990 words according to the word count function of the word-processing program used to produce the brief. The number of words in this answer complies with the requirements of Rule 8.504(d)(1) of the California Rules of Court.

Ellison Folk

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PROOF OF SERVICE

California Building Industry Association, et al. v. Bay Area Air Quality Management District; Supreme Court of California
Case No. S213478

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the City and County of San Francisco, State of California. My business address is 396 Hayes Street, San Francisco, CA 94102.

On February 25, 2014, I served true copies of the following document(s) described as:

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P Spencer

Patricia A. Spencer

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